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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 377

ROYSTER DRIVE-IN THEATRES, INC., *Petitioner*,

v.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; WARNER BROTHERS PICTURES DISTRIBUTING CORPORATION; T.C.F. FILM CORPORATION; RKO RADIO PICTURES, INC.; LOEW'S INC.; COLUMBIA PICTURES CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 8, 1959.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, rendered on June 8, 1959, has not yet been reported. It is printed as Appendix A hereto, *infra*, p. 1a.

The United States District Court for the Southern District of New York rendered no opinion. But it did issue findings of fact, conclusions of law and a judgment, all of which are printed as Appendix B hereto, *infra*, p. 12a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1959. This petition for a writ of certiorari is being filed less than 90 days after the entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the District Court has found, in a private antitrust action, the existence of an unlawful conspiracy, may the court render judgment against the plaintiff under Rule 41(b) without imposing on the conspirators the burden of proving their abandonment of the conspiracy?

2. Is the adoption of competitive bidding by itself enough to dissipate the effects of an unlawful antitrust conspiracy where the victim of the conspiracy is a small independent film exhibitor bidding solely against a competitor who is one of the conspirators and part of a nationwide chain of theatres with relatively greater resources?

3. Is the victim of an antitrust conspiracy barred from maintaining an action for treble damages for failure to make a formal demand for a fairer distribu-

tion of the film product where he has made known his dissatisfaction with the distribution methods and has sought to mitigate damages by renting whatever films were made available to him?

STATUTES AND RULES INVOLVED

15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

15 U.S.C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . ."

15 U.S.C. § 26:

"Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ."

Rule 41(b), Federal Rules of Civil Procedure:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dis-

missal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

STATEMENT OF THE CASE

This is an action for treble damages and an injunction under the antitrust laws.[1] The plaintiff, petitioner herein, is the operator of the Peekskill Theatre in Peekskill, New York, and the defendant-respondents are (1) the operator[2] of the Paramount Theatre, the competing motion picture theatre in Peekskill, and (2) seven of the eight major motion picture distributors.[3] The complaint alleged a conspiracy to monopolize and actual monopolization of the motion picture exhibition business in Peekskill. More specifically, it was alleged that the great bulk of the more desirable pictures were wrongfully withheld from petitioner and awarded to petitioner's competitor.

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[1] The complaint alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The relief prayed for was treble damages and an injunction under sections 4 and 6 of the Clayton Act, 15 U.S.C. §§ 15, 26.

[2] The operator is the respondent American Broadcasting-Paramount Theatres, Inc.

[3] Known by the short names of Paramount, Warner Bros., Fox, Loew's, RKO, Columbia and United Artists.

This case had it origins in the decision of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), holding that eight corporations, including Paramount Pictures, Inc., had conspired with each other to monopolize the motion picture exhibition business throughout the United States. Subsequently, in 1949, the Paramount defendants agreed to the entry of a consent decree providing for the divorcement of theatre exhibition from production and distribution of films. Paramount Pictures, Inc., was dissolved and new corporations were formed to operate the divorced businesses. As a result, the corporation now known as American Broadcasting-Paramount Pictures, Inc., (a respondent herein and referred to hereinafter as AB-PT), was organized to own and operate all the "Paramount" theatres throughout the land.

The aforementioned consent decree also provided that the original Paramount company or the new theatre company (AB-PT) must make disposition, by sales to independents, of a large number of theatres in specifically named cities and towns where Paramount had achieved a complete monopoly of exhibition. Included among those cities were Peekskill, N. Y., and Poughkeepsie, N. Y., one theatre in each city being ordered sold. The stated purpose of this part of the decree was to create "substantial motion picture theatre operating competition in the communities hereinafter listed." CCH Trade Cases, 1948-49, Par. 62,377 (March 3, 1949).

Against this background, the petitioner presented the following facts at the trial:

The petitioner corporation was organized in 1950 by two individuals, one a former district theatre manager for Paramount Pictures, Inc., and the other a former

district theatre manager for Warner Bros. This corporation purchased from AB-PT the Peekskill Theatre in Peekskill and the Colonial Theatre in Poughkeepsie for the total price of $193,000; AB-PT took back mortgages on both theatres. This sale, of course, was made by AB-PT pursuant to the requirements of the consent decree.

The controversy in this case centers about the efforts of petitioner to operate the Peekskill Theatre in competition with the larger Paramount Theatre in Peekskill retained by AB-PT and, thus, to bring about an effectuation of the purpose of the consent decree respecting the creation of "substantial motion picture theatre operating competition" in Peekskill.[4] Under Paramount's operation, the Peekskill Theatre had become known as a "sloughi" house, had been allotted only inferior pictures, and had been kept in a relatively poor physical condition. Immediately after purchasing this theatre on April 8, 1950, petitioner began to recondition and improve it. These improvements, costing over $45,000, were substantially completed by September 30, 1950, the date when the alleged damages began to accrue.

Shortly after the purchase, on April 17, 1950, petitioner's two officers began efforts to buy pictures for the Peekskill Theatre, which continued in operation during the renovation period. They visited the distributors' exchanges in New York City. All but Uni-

[4] In Poughkeepsie, Paramount had operated three theatres—the Colonial, the Bardavon and the Stratford. The better pictures had been shown at the Colonial and Bardavon and the inferior ones at the Stratford. After petitioner acquired the Colonial, AB-PT eventually agreed to a 50-50 split of the better pictures as between the Colonial and the Bardavon. The respondent distributors never failed to acquiesce in that arrangement.

versal refused to make any arrangements for the sale of pictures to petitioner for use in the Peekskill Theatre unless and until AB-PT approved the arrangement. R. 52-70, 502-507. The officers reported this situation to AB-PT and requested an allotment of pictures. AB-PT granted this request and designated certain named pictures for use at the Peekskill Theatre. After learning of this arrangement, the respondent distributors sold the specified pictures to petitioner. R. 84-99. This method of obtaining pictures was followed and continued until about May 15, 1950, at which time petitioner engaged the services of a film buying agent.

With respect to this initial period from April 17, 1950, to May 15, 1950, the District Court expressly found that the respondents, by virtue of the foregoing conduct, were guilty of conspiring to deprive petitioner of a fair and reasonable supply of pictures for use in the Peekskill Theatre. And the court concluded (Findings 28-32) that the "purpose and object of such conspiracy was to prevent plaintiff's theatre from competing effectively with the Paramount Theatre in Peekskill during such period." Thus, at the very beginning of petitioner's operations, an illegal pattern was established whereby the choicest pictures were shown at the Paramount Theatre and only those which were rejected or otherwise not needed by AB-PT were permitted to be shown at the Peekskill.

Thereafter, petitioner, through its agent, made repeated efforts to obtain a fairer share of pictures for the Peekskill Theatre. All summer long, until September 15, 1950, the agent was able to obtain only those pictures which AB-PT's representative designated, pictures which that representative described as

"slough product that he would not be able to use at the Paramount Theatre." R. 964-966. And time and again the petitioner's agent was asked if the matter had been cleared with Paramount or AB-PT's representative before the agent could obtain the specified pictures from the respondent distributors. R. 965-975. In thus denying petitioner a share of the grade "A" pictures, AB-PT repeatedly stated that all of the "A" product was needed for use at the Paramount Theatre in Peekskill. R. 976-9 .

About September 15, 1950, petitioner's agent sent letters to the various respondent distributors requesting that "your product be split in the town of Peekskill between the Paramount and our Peekskill Theatre" or "if you cannot split the product we would like to take this opportunity of requesting that the pictures be offered for competitive bidding." Exs. AF, J, K, L, AR and R. 541. None of the respondent distributors replied to the primary request for splitting the product but each acquiesced in the alternative request for competitive bidding.

A month later, however, petitioner's agent was advised by representatives of Loew's and Warner Bros. that "bidding would not be the solution to this situation" and that they "don't want to go into bidding in Peekskill." The agent was advised to go back to AB-PT and "try to work something out with Paramount on this thing." R. 978-979. But the most AB-PT would offer, after again refusing to make any "A" pictures available to petitioner, was to make available the mediocre pictures "that played at the Stratford Theatre in Poughkeepsie." Petitioner felt economically impelled to accept this small offer. R. 979-981. But only after the respondent distributors acquiesced in and approved the agreement did it become

effective. R. 982-986. Thereafter competitive bidding was discontinued and petitioner exhibited at the Peekskill Theatre all of the mediocre pictures that played at the Stratford. This arrangement continued until about April 1, 1951. R. 981.

AB-PT abruptly informed petitioner on April 1 that it would no longer honor the foregoing agreement since AB-PT needed some of the "Stratford" pictures for use at the Paramount Theatre in Peekskill. R. 987. Petitioner was accordingly forced to use a still more inferior grade of pictures at the Peekskill Theatre. From April to December, 1951, AB-PT used 37 of the "Stratford" pictures at the Paramount Theatre.

As a result of this deterioration of product, petitioner's losses at the Peekskill Theatre continued to increase. Ex. BF. About December 20, 1951, petitioner requested the respondent distributors to allow petitioner to bid competitively against AB-PT for pictures to be shown in Peekskill. This request was granted and bidding for pictures continued until April 9, 1952. R. 388. During this period, the average amount of film rental paid by AB-PT in relation to its box office receipts at the Paramount Theatre increased at the rate of 62.5%, while petitioner's film rental at the Peekskill Theatre increased at the rate of 72%.

At the time when these film rental increases were occurring, both the Paramount and Peekskill Theatres "were in serious financial trouble" and the lives of both theatres were in jeopardy. Consequently, on April 1, 1952, petitioner informed AB-PT that because of these high costs petitioner had decided to discontinue competitive bidding. Petitioner thereupon requested a reinstatement of the arrangement whereby petitioner would acquire the "Stratford" pictures. R.

545-547, but AB-PT replied that it would not do so before Labor Day, 1952. As an alternative, AB-PT promised to make available to petitioner six grade "A" pictures during the summer. R. 547. That promise was not kept and petitioner was forced to use inferior pictures all summer long.

Finally, on August 28, 1952, AB-PT informed petitioner that "we are going to book the Paramount Theatre as we see fit and what pictures are left, you can have for the Peekskill Theatre." R. 108. As a result, petitioner closed the Peekskill Theatre on October 11, 1952, and it has remained closed. Exs. 2, 7. AB-PT has subsequently foreclosed on its mortgage and repossessed the theatre.

Petitioner's fully qualified motion picture expert testified that during the period from September 30, 1950, to October 11, 1952, the following statistics were available as to the pictures exhibited at the Paramount and Peekskill Theatres and the receipts therefrom (R. 868-870, Exs. 7, 9, 10a, 24, 26, 27, BD):

	Paramount Theatre	Peekskill Theatre
Class A pictures exhibited	138	34
Class B pictures exhibited	47	51
Class C pictures exhibited	67	121
Number of Class A pictures acquired by competitive bidding	11	11
Number of pictures of respondent distributors previously exhibited at either the Colonial or Bardavon theatres in Poughkeepsie	170	45
Number of such pictures acquired by competitive bidding	14	12
Number of "repeats" or "reissues", previously shown elsewhere, exhibited	1	60
Percentage of exhibited pictures distributed by respondent distributors	84%	60%
Total box office receipts	$253,766.60	$168,872.48
Total film rental paid	$ 88,683.97	$ 53,451.89
Difference between gross box office receipts, less film rental	$ 49,662.04	....

At the close of petitioner's case, which was tried without a jury, respondents moved for dismissal of the complaint and entry of judgment under Rule 41(b) of the Federal Rules of Civil Procedure. Following the submission of briefs and oral argument, the court announced that it had decided to grant respondents' motion and directed that requests for findings of fact and conclusions of law be filed by both sides. Subsequently, on September 10, 1958, the District Court entered a formal order dismissing the complaint and entering judgment for the respondents. See p. 31a, *infra*.

Simultaneously with the entry of the order the District Court filed 103 findings of fact and 4 conclusions of law, but no opinion was filed. Of the court's 103 findings, 98 were verbatim copies of those requested by respondents,[3] and all four of the conclusions of law were taken verbatim from those submitted by respondents. These findings may be summarized as follows:

(1) During the initial period from April 17, 1950, to May 15, 1950, the respondents were guilty of conspiring to deprive petitioner of a fair and reasonable supply of pictures for use at the Peekskill Theatre, the purpose of the conspiracy being to prevent petitioner from competing effectively with AB-PT's Paramount Theatre.

(2) There was no evidence of any vertical or horizontal conspiracy in violation of the antitrust laws after May 15, 1950.

[3] In its blind copying of respondents' requested findings, the District Court failed to copy Finding 40 properly so that the finding is grammatically incoherent at the end. See Appendix B, p. 19a, *infra*.

(3) Whatever conspiracy may have existed up until September 15, 1950, such conspiracy was fully terminated "when plaintiff demanded and was accorded the right to bid competitively for the pictures of the defendant distributors." Competitive bidding was available at all times and such bidding was truly competitive and the offers secret. But petitioner avoided such bidding when it thought it could obtain pictures for exhibition in any other way.

(4) Apart from the periods of competitive bidding, petitioner never communicated with any distributor about the licensing or booking of any picture. Indeed, after the Peekskill Theatre was renovated, petitioner never "made any demand to any distributor, which demand was refused." Such failure to make a demand was found to be "fatal to the plaintiff's claim" since it clearly indicated that "the arrangements voluntarily made by plaintiff were satisfactory to it."

(5) Petitioner "failed to prove that it suffered any damage as the result of any act of the defendants . . . in violation of law, and . . . to prove the amount of its damages, if any."

The Court of Appeals affirmed, holding that the findings of fact were not clearly erroneous and that "they are—over-all—adequate and soundly based." The court further held that the allowance of competitive bidding by the respondents was properly found sufficient by the District Court to terminate any conspiracy that may have existed and that petitioner's failure to make a demand to the respondent distributors under the circumstances was fatal to its claim of damages.

REASONS FOR GRANTING THE WRIT

This petition presents important and unresolved questions that are critical to the effective operation of the private cause of action created by the antitrust laws. Those questions are presented in the context of a case growing out of this Court's decision in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), as implemented by subsequent lower court decrees.

Indeed, the uncontested factual situation revealed by this case brings directly into focus the provision of the *Paramount* consent decree, entered in the District Court below following remand from this Court, specifically requiring the creation of "substantial motion picture theatre operating competition" in Peekskill, N. Y. That directly relevant provision provides the backdrop of this private treble damage suit against which must be tested the standards of proof erected and imposed by the courts below. And when that testing is done it becomes apparent that the judgment below imposes such unfair and unrealistic standards of proof as to vitiate the very essence of the general principles of this Court's judgment in the *Paramount* case and of the legislative policies respecting private antitrust suits. This case thus involves not only unwarranted restrictions on petitioner's right to relief but also serious implications radiating far beyond this particular case. In brief, this is another important instance of the "trend . . . of hostility" of certain lower courts towards private antitrust suits, particularly those evolving out of the *Paramount* decision, which has resulted in a "definite infringement of legislative policy." Clark, J., dissenting in *Eagle Lion Studios, Inc.* v. *Loew's, Inc.*, 248 F. 2d 438, 451 (C.A. 2, 1957), aff'd by equally divided Court, 358 U.S. 100 (1958).

1. The impact of the initial violation

The starting point of this case is the uncontested determination of the District Court (Findings 28-32) that from April 17, 1950, when petitioner began operations, to at least May 15, 1950,[8] the respondents "agreed and conspired with each other to withhold from plaintiff's Peekskill Theatre a fair and reasonable supply of pictures" in order "to prevent plaintiff's theatre from competing effectively with the Paramount Theatre in Peekskill during such period." As to that period, the District Court squarely found that the respondent distributors had unlawfully refused to license any pictures for exhibition at petitioner's theatre without the approval of the competitor, respondent AB-PT, and that AB-PT had unlawfully restricted petitioner to the exhibition of certain pictures unwanted by AB-PT.

Hence there was a finding below that even after the period of this Court's *Paramount* decision and of the decree entered subsequent thereto, the respondents continued their unlawful conspiracy and that this petitioner was the specific target of that conspiracy. In this very vital sense, therefore, the instant case differs from *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533 (C.A. 2, 1959), cert. den., 360

[8] The District Court, in Finding 48, stated that there was "no evidence of any unlawful conspiracy after May 15, 1950, and in any event such conspiracy or conspiracies were fully terminated by September, 1950. . . ." The Court of Appeals treated this as a "finding of a conspiracy in the initial period before September 30, 1950." In any event, whether the conspiracy was found to have ended on May 15 or September 30, the fact remains that respondents filed no cross-appeal and did not contest the findings as to the existence of an unlawful conspiracy against the petitioner in the period preceding September 30, 1950.

U.S. 912 (1959), relied upon below in support of the proposition that petitioner had the burden of proving that the established conspiracy did in fact continue. In the *Webster Rosewood* case, as in *Eagle Lion Studios, Inc.* v. *Loew's Inc.*, 248 F. 2d 438 (C.A. 2, 1957), aff'd by equally divided Court, 358 U.S. 100 (1958), the court had found that the petitioner had failed to show that the conspiracy condemned in the *Paramount* case had continued or that the petitioner there was within the target area of any such unlawful conspiracy.

But in this case the petitioner was clearly the intended victim of an unlawful conspiracy in effect after the *Paramount* judgment. And petitioner's evidence clearly indicated that after September 15, 1950, the respondents continued to discriminate in furnishing pictures for exhibition at petitioner's Peekskill Theatre and that petitioner was injured as the result of that discrimination. The respondents offered no evidence whatever. Such facts give rise to a strong presumption—rebuttable only by evidence yet to be adduced by respondents—that the losses sustained by petitioner were the result of a continuation of the unlawful conspiracy.

An important question is thereby raised as to the impact this admitted violation of law had upon petitioner's burden of proof and upon the efficacy of the findings of fact as to the period of time subsequent to September 30, 1950, when the damage claim started.[7] The petitioner here proved an initial violation and presented evidence indicating that the core of that viola-

[7] The period for which damages were here claimed ran from September 30, 1950, when the remodeling of the Peekskill Theatre was completed, to August 4, 1954, the date this suit commenced.

tion—the availability of pictures to petitioner only to the extent approved by AB-PT—continued far beyond May 15, 1950.[8] Time and again petitioner found the approval of AB-PT necessary to the securing of an adequate film supply. A necessary question was thus raised as to whether, especially in light of this initial violation, the burden shifted to the respondents "of going forward with the evidence to explain away or contradict it," *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 225-226 (1939), with respect to the subsequent periods of time. It has long been settled that "a conspiracy once established is presumed to continue until the contrary is established" by the conspirators, *Coates* v. *United States*, 59 F. 2d 173, 174 (C.A. 9, 1932), and that "in the absence of definite proof to that effect, abandonment will not be presumed." *Local 167* v. *United States*, 291 U.S. 293, 298 (1934). See also *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *Marino* v. *United States*, 91 F. 2d 691, 695 (C.A. 9, 1937); *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C.A. 3, 1942); *United States* v. *Reina*, 242 F. 2d 302, 307 (C.A. 2, 1957). Application of that rule to this case would have required the tender of evidence by respondents as to the abandonment of the conspiracy.

This question goes to the very heart of the ruling below. If there was a burden on the respondents to

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[8] The only event occurring on May 15, 1950, to make that date worthy of mention, was petitioner's employment of a film-buying agent, Liggett and Florin. The employment of this agent in no way altered the effect of the negotiations between petitioner and the various respondents. Nor could such employment negate the unlawful restrictions previously imposed. In other words, nothing happened on May 15, 1950, to terminate the conspiracy that was found to have commenced on April 17, 1950.

prove that the initial violation was entirely dissipated during the later periods of time the District Court's findings of fact as to those periods become "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. Those findings, as approved by the court below, were necessarily premised on the belief that the burden of proof lay entirely on the petitioner. Judgment having been rendered under Rule 41(b) at the end of petitioner's case, the respondents were never put to proof. And petitioner never received the benefit of any failure on respondents' part to demonstrate the termination of the proved conspiracy. On that basis the Court of Appeals plainly erred in approving the District Court's findings and its misinterpretation and misapplication of Rule 41(b).

The question as to the impact of a proved violation of law upon the plaintiff's burden of proof in this type of situation has an obvious significance to the development and application of the treble damage and injunctive provisions of the antitrust laws. The absence of any controlling decision on this important point warrants the exercise of this Court's certiorari jurisdiction at this time.

2. The effect of competitive bidding

A second important issue raised by the decision below is the effect on petitioner's right to relief of the system of competitive bidding utilized by the parties. The question is not whether the system of competitive bidding is a *per se* violation of law or whether the system here used was fair or freely competitive. Rather the question is whether such a system, operating in the context of an unlawful conspiracy not otherwise shown to have been dissipated, is enough to drain the conspiracy of life and content and to destroy any

causal relationship with any ensuing financial losses. Is the system of competitive bidding *per se* adequate, without regard to surrounding circumstances, to cure a proved violation of the antitrust laws with respect to a local distribution and exhibition of motion pictures?

This Court in the *Paramount* case, 334 U.S. at 161-166, cast serious doubt on the capacity of the system of competitive bidding "to open up to competition the markets which defendants' unlawful restraints have dominated." Such a system, said the Court, "promises the advantage to the exhibitor who is in the strongest financial position," placing a premium on purchasing power. While those statements were related to a nationwide conspiracy, they are no less relevant to a local situation such as is here involved where a small exhibitor is seeking "to open up to competition the markets which defendants' unlawful restraints have dominated." As was stated in *Bigelow* v. *Loew's, Inc.*, 201 F. 2d 25, 28 (C.A. 7, 1952), "it is the end result and not the system employed which is important." And on that basis the decision below is flatly inconsistent with the holding in the *Paramount* case.

In this case, the competitive bidding episodes took place between (1) the petitioner—a small, independent and new exhibitor with limited financial resources, and (2) the respondent AB-PT—a large, nationwide organization with relatively greater resources and a stronger financial position. The economic disparity between the competitors was both marked and obvious. And AB-PT was bidding on behalf of a theatre that was larger, of better past reputation, and possessive of other features causing AB-PT to retain it rather than the Peekskill Theatre. The end result of that disparity in bidding power was to drive petitioner out of business and to restore to AB-PT the original

monopoly situation in Peekskill. Thus the availability of competitive bidding in the context of this case was an empty solution to the problem, at least until the effects of the proved conspiracy in this local market had been otherwise dissipated. In light of the pre-existing conspiracy, competitive bidding was quite consistent with the continuation of that conspiracy—thus emphasizing once again the basic error of the courts below in permitting judgment to be rendered against petitioner under Rule 41(b) without putting respondents to their proof.

The decision below accordingly stands for the unsupportable proposition that, irrespective of particular market factors, the availability of competitive bidding *per se* immunizes conspirators from liability for losses suffered by an independent exhibitor in the course of seeking a fair and reasonable supply of premium pictures. Such an untenable holding is alone enough to warrant review by this Court. And since this Court has not had occasion to discuss and clarify the practice of competitive bidding since the *Paramount* case, particularly in relation to local theatre situations and in relation to a proved pre-existing conspiracy, the present case presents an appropriate vehicle for such clarification. The question here is plainly substantial and important in the effectuation of the legislative antitrust policies. See *Loew's, Inc.* v. *Milwaukee Towne Corp.*, 201 F. 2d 19 (C.A. 7, 1952); *Biglow* v. *Loew's, Inc.*, 201 F. 2d 25 (C.A. 7, 1952); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 139 F. Supp. 809 (N.D. Ill., 1956).

3. The necessity for a demand

The third substantial question raised by the decision below is whether the failure of petitioner to make more

formal demands of the respondent distributors was, under the circumstances, fatal to the cause of action for damages and injunctive relief. That question arises in a case where the petitioner repeatedly made plain to the distributors its dissatisfaction with the pictures available to it. And that question arises in a case where, as an integral part of the conceded conspiracy in existence prior to the critical period, the distributors had categorically informed petitioner that only such pictures would be made available as the large competitor, AB-PT, would permit or approve. Whatever pictures petitioner got were to be at the sufferance of AB-PT.

Some sort of demand is undoubtedly required in the usual situation where an exhibitor seeks damages for failure to obtain first-run pictures. See *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840, 845 (C.A. 2, 1954); *Webster-Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533, 536 (C.A. 2, 1959); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568 (C.A. 7, 1951). But circumstances may alter the necessity of making a formal demand, as where such a demand is impossible, useless or cumulative. *Congress Building Corp.* v. *Loew's, Inc.*, 246 F. 2d 587 (C.A. 7, 1957).[9] Where there are such circumstances, to insist upon the making of a demand is "to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws."

[9] In the *Congress Building Corp.* case, a nonoperating owner-lessor was held entitled to maintain a private treble damage action even in the absence of demands on the exhibitors since, as lessor, it was not in a position to negotiate for and obtain licenses to exhibit pictures. Only the lessee could have made such demands, but none had in fact been made.

Radovich v. *National Football League*, 352 U.S. 445, 454 (1957).

Here the petitioner had been told by the distributors that it could have only those pictures sanctioned by the competitor, AB-PT. When petitioner asked the distributors for a split of pictures between the Paramount Theatre and the Peekskill Theatre the request was ignored. At conference after conference the distributors were made aware of petitioner's constant desire for a better share of the distribution of pictures in Peekskill. Finally, petitioner asked for and obtained competitive bidding, only to be told by the distributors that such bidding was not wanted and was not "the solution to this situation." And after accepting further crumbs from the AB-PT table, petitioner turned once again to competitive bidding only to find that process economically disastrous. What practical significance a more formal demand for grade "A" pictures would have had in these circumstances is difficult to imagine.

Moreover, petitioner's actions in renting what films AB-PT permitted it to acquire and in voluntarily agreeing to splits and competitive bidding to the ultimate extent of its financial resources in no way augmented the necessity for a formal demand for grade "A" pictures. Such actions were no more than efforts by petitioner to mitigate the damages created by the conspiracy. To say, as the courts below said (p. 6a, *infra*), that these "arrangements voluntarily made by plaintiff were satisfactory to it" is to ignore the realities of the situation confronting petitioner and to prejudice all conspiracy victims who seek to mitigate their damages.

Indeed, the judgment below may properly be described as one exalting form over substance, ignoring the economic realities of both competitive bidding and the need for formal demands. In a real sense, the court below has ignored the basic principle that "when the Sherman Act is involved the critical fact is the impact of the particular practice on competition, not the label that it carries." *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953); see also *United States* v. *Masonite Corp.*, 316 U.S. 265, 280 (1942). And in imposing a formalistic requirement of a demand as a condition to the maintenance of a treble damage suit, regardless of surrounding circumstances here present, the court below has engrafted onto the antitrust laws something Congress deemed unnecessary. The court has thereby vitiated an important part of the private mode of relief as created by Congress. Only this Court can correct such a substantial and important deviation in legislative policy.

CONCLUSION

To the end that the legislative policies respecting the private cause of action for violations of the antitrust laws may be obeyed and that adherence be given to the judicial implementation of those policies in the long history of the *Paramount* litigation, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted. Should this Court then determine that the courts below erred in rendering judgment against the petitioner under Rule 41(b), the matter could then be remanded to the District Court for a new trial so that the proper

standards of proof may be followed and damages to petitioner calculated in light thereof.

Respectfully submitted,

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Counsel for Petitioner

September 4, 1959

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 200—October Term, 1958.

(Argued March 11, 1959 Decided June 8, 1959.)

Docket No. 25379

ROYSTER DRIVE-IN THEATRES, INC., *Plaintiff-Appellant*,

—v.—

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *et al.*, *Defendants-Appellees*.

Before: WASHINGTON,* WATERMAN and MOORE, *Circuit Judges*.

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, dismissing the complaint for triple damages and an injunction in an action brought under the antitrust laws. Findings of fact and conclusions of law below not reported. Affirmed.

FRANCIS T. ANDERSON, of Gray, Schaffer & Malloy, Philadelphia, Pa. (Cormac J. Malloy, of Gray, Schaffer & Malloy, Philadelphia, Pa., on the brief), *for appellant*.

ALBERT C. BICKFORD, of Simpson, Thacher & Bartlett, Frederick W. R. Pride, of Royall, Koegel, Harris & Caskey, E. Compton Timberlake, and Myles J. Lane, of Schwartz &

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* Sitting by designation pursuant to 28 U. S. C. § 294(a).

Frohlich, New York City (Whitney North Seymour, Jr., of Simpson, Thacher & Bartlett, John F. Caskey and Leonard Stecher, of Royall, Koegel, Harris & Caskey, Bernard E. Kalman, Louis Phillips, New York City, and Everett A. Frohlich and Bernard R. Sorkin of Schwartz & Frohlich, New York City; on the brief), *for appellees.*

WASHINGTON, *Circuit Judge:*

This is an action brought under Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1952). Plaintiff-appellant sought treble damages and an injunction under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737 (1914), 15 U. S. C. 15, 26 (1952).

Plaintiff-appellant is the operator of a motion picture theatre in Peekskill, New York, known as the Peekskill. Defendants-appellees are (1) American Broadcasting-Paramount Theatres, Inc. (AB-PT), the operator of the Paramount motion picture theatre in Peekskill and a competitor of the plaintiff, and (2) seven major motion picture distributors—Paramount, Warner Brothers, Fox, Loew's, RKO, Columbia, and United Artists. Plaintiff alleged that defendants had conspired to monopolize and in fact had actually monopolized the motion picture exhibition business in Peekskill by having wrongfully withheld from plaintiff and having awarded to plaintiff's competitor the great bulk of the more desirable motion pictures.

The case was tried before the court without a jury. At the close of plaintiff's case defendants moved for a dismissal of the complaint and entry of judgment for defendants under FED. R. CIV. P. 41(b). The judge made findings of facts and conclusions of law and entered a formal order dismissing the complaint and entering judgment for the defendants. This appeal followed.

Briefly, the basic findings of the trial court were as follows:

April 1950-September 30, 1950: On April 5, 1950, AB-PT, pursuant to the divestment decree in a civil antitrust action involving Paramount Pictures,[1] sold the Peekskill Theatre. Plaintiff was the purchaser. Previously, AB-PT had owned both the Paramount and Peekskill Theatres in Peekskill. The Paramount Theatre had always been a top-class theatre and had always shown top quality films. Prior to April 6, the Peekskill had been in a state of disrepair and had generally exhibited slough pictures, re-issues, repeats, and C-grade films. Following the purchase of the Peekskill, plaintiff began to repair and renovate it.

The trial court found that from April 17, 1950, until May 15, 1950, the defendants-appellees "agreed and conspired with each other to withhold from plaintiff's Peekskill Theatre a fair and reasonable supply of pictures," the purpose and effect of the conspiracy being "to prevent plaintiff's theatre from competing effectively with the Paramount Theatre * * * during such period." It may be noted parenthetically, however, that plaintiff seeks damages only for a later period, namely, from September 30, 1950, to August 4, 1954 the date this suit was commenced.

On May 15, 1950, plaintiff retained an agent to license and book its motion pictures. The agent booked various pictures for the plaintiff during the summer of 1950. A few days prior to September 15, 1950, plaintiff and its agent advised AB-PT that it wanted a share of "A" films, and that if it did not get an "A" product it was going to ask the distributors for competitive bidding. On September 15, 1950, the agent wrote letters to several of the distributor defendants requesting either a split of product or competi-

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[1] *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S. D. N. Y. 1949), *on remand from Supreme Court*, 334 U. S. 131 (1948), *affirming in part* 66 F. Supp. 323 and 70 F. Supp. 53 (S. D. N. Y. 1946).

tive bidding. The distributors thereupon inaugurated competitive bidding and offers were solicited from plaintiff and AB-PT on some pictures. On September 30, 1950, plaintiff finally completed renovating the Peekskill.

October 1, 1950-December 1951: In October 1950, the plaintiff and its agent met with AB-PT and agreed that the Peekskill Theatre would try out an arrangement to split the film product, under which the plaintiff would negotiate for the pictures which had played or would play at the Stratford Theatre (owned by AB-PT) in Poughkeepsie. Because of this arrangement, plaintiff shortly thereafter withdrew its requests to the distributors for competitive bidding. For the next six months, plaintiff was quite happy with the film-split arrangement. It requested no different product for the Peekskill Theatre.

In April 1951, AB-PT advised plaintiff that the Paramount Theatre in Peekskill needed more pictures and would start taking some from the Stratford product. The arrangement was therefore terminated.[2]

December 1951-October 1952: In December 1951 and January 1952, plaintiff again wrote to the various distributor-defendants requesting competitive bidding. Each distributor afforded plaintiff an opportunity to bid competitively for each picture for first-run exhibition in Peekskill. For several months the bidding continued. There was no evidence that AB-PT ever overbid for any picture.

In April 1952, plaintiff again approached AB-PT in order to work out some "split" arrangement whereby competitive

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[2] The trial court stated that no evidence was adduced as to the manner in which licenses for the exhibition of motion pictures in Peekskill were negotiated during the period from April 1951 to December 1951. Actually, however, the testimony seems to indicate that during that period plaintiff's agent made inquiry of AB-PT from time to time as to the pictures which the latter wanted, and those it did not want, for the Paramount Theatre. The information was supplied to him. The matter does not appear controlling under our view of the case.

bidding would once more be eliminated. AB-PT and plaintiff again agreed to a split of product, and shortly thereafter plaintiff notified the distributor defendants that it wished to terminate competitive bidding. By this time plaintiff's economic position had become extremely difficult, partly because of the increase of television sets in the Peekskill area during the period of plaintiff's operation, partly because of a number of changes in the competitive situation in Peekskill such as the opening of new drive-in theatres, and partly because of the increase of plaintiff's expenses after the renovation of the Peekskill during a period of declining grosses. Finally, on October 11, 1952, plaintiff closed the Peekskill Theatre and has never operated it since that time.

From the facts adduced, the court made four basic findings:

(1) There was no evidence of any vertical or horizontal conspiracy in violation of the Sherman Antitrust Act after May 15, 1950.

(2) Whatever conspiracy may have existed up until September 15, 1950, was fully terminated "when plaintiff demanded and was accorded the right to bid competitively for the pictures of the defendant distributor." In this regard, not only was competitive bidding[a] "available to the

[a] The court said that

> "Competitive bidding is a fair and reasonable method of resolving conflicting demands of competing exhibitors for a license to exhibit a particular picture or pictures on the same run."

The court further defined competitive bidding as a process by which

> "a distributor advises each exhibitor of the picture for which offers are solicited. Each exhibitor independently decides the amount which it is willing to offer for the right to exhibit the particular picture and submits an offer to the distributor. The competing offers are evaluated by the distributor and the license to exhibit the picture is awarded to the exhibitor whose offer is believed to present the most satisfactory licensing opportunity."

plaintiff at all times during the period of plaintiff's operation for each picture of each defendant-distributor," but also such bidding "was truly competitive and neither exhibitor knew the offers made by the other exhibitor." Despite the opportunity for competitive bidding, however, plaintiff avoided such an arrangement at all times during its operation when it thought it could get pictures for exhibition in any other way.

(3) Apart from the actual periods of competitive bidding, plaintiff never communicated with any distributor concerning the licensing or booking of any motion picture, either before the requests for competitive bidding were made or after the requests for competitive bidding were withdrawn. Indeed, the court found no evidence that, after the renovation of the theatre, "plaintiff * * * ever made any demand to any distributor, which demand was refused." This failure to make a demand was therefore "fatal to the plaintiff's claim" since it clearly indicated that "the arrangements voluntarily made by plaintiff were satisfactory to it."

(4) Finally, plaintiff "failed to prove that it suffered any damage as the result of any act of the defendants or any of them in violation of law, and * * * to prove the amount of its damages, if any."

I.

Appellant claims that the court erred in finding that the conspiracy which existed up to May 15, 1950, was confined to that period. Therefore, appellant argues, the court also was in error in finding that (1) there was no unlawful conspiracy after May 15; (2) even if such conspiracy existed, it terminated when competitive bidding was allowed; and (3) even if a conspiracy continued, it was not the proximate cause of any legal injury to plaintiff giving rise to any claim for damages. Appellant finally claims

that findings relating to the period from April 1952 were inadequate.

Our review of the record, however, does not lead us to the conclusion that the trial court's findings of fact are clearly erroneous. See FED. R. CIV. P. 52(a). On the contrary, we think they are—over all—adequate and soundly based, and certainly so as to the portions of which appellant complains. Here, as in a somewhat similar case recently before this court, "the plaintiff had the burden of proving that the conspiracy in fact did continue * * *" *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.*, 263 F. 2d 533, 535 (1959). The District Court could properly find that the burden was not sustained.

II.

Appellant also contends that the court below was in error in holding on the facts before it that the allowance of competitive bidding by the distributor-defendants was sufficient to terminate any conspiracy that may have existed. Appellant points to *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 164 (1948), in which a system of competitive bidding originally ordered by the three-judge District Court in its decree was reversed by the Supreme Court in favor of divestiture.

Such a contention has been raised in other cases and has been rejected. As the Seventh Circuit has indicated: "[T]he reasons assigned by the Supreme Court for rejecting the elaborate system of competitive bidding, applicable to a nation-wide industry, * * *, [bear] little relation to a situation where all competing exhibitors are in the same restricted locality." *Loew's, Inc.* v. *Milwaukee Towne Corp.*, 201 F. 2d 19, 24 (7th Cir. 1952), cert. denied 345 U. S. 951 (1953). We recognize that the system of competitive bidding has serious drawbacks for competing exhibitors. It places a premium on experience, judgment, and financial resources. Costs for all competitors tend to rise,

and in the end all may suffer. See Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 So. Calif. L. Rev. 150, 161-64 (1958). The so-called "split" system, whereby exhibitors divide the list of available pictures and then approach the distributors separately on that basis, enables them to purchase films at lower prices. Whatever the legality of this system—and we are not called upon to deal with that issue here—it probably tends to keep more exhibitors in business than would be the case if competitive bidding were the universal rule. See *id.* at 164-65.

"Plaintiff-appellant apparently rejects both these systems—the split and the competitive bid. What it would have in their stead is far from clear. Its primary object in this suit, of course, is to collect damages from the defendants, blaming on them the collapse of its theatrical enterprise in Peekskill.[4] This it cannot do unless it shows a violation of law, and a causal connection between the violation and its losses. Clearly, the appellant cannot be heard to condemn a system of competitive bidding as a *per se* violation of law. Appellant is only entitled to be placed in the same competitive situation as its competitors. Yet, if its reasoning were carried to its logical conclusion, the courts would be required to place it in a preferred or privileged position, superior to that of its competitors. This we cannot do. See *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d

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[4] The trial court's finding of a conspiracy in the initial period before September 30, 1950, appears to have been largely based on evidence that defendants followed like policies with respect to appellant, i.e., each distributor was unwilling to negotiate for a particular film unless and until notified that the Paramount Theatre did not wish to show it. No cross-appeal was taken from the judgment, and appellees do not contest this finding in this court. With respect to the defendant AB-PT, there is little or no evidence that it sought to drive appellant out of business; rather, it appears to have been interested in maintaining its own theatre as the leading one in the community.

561, 571 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952); *Bigelow* v. *RKO Radio Pictures, Inc.*, 162 F. 2d 520, 524 (7th Cir.), cert. denied, 332 U. S. 817 (1947). A system of competitive bidding is clearly valid if the films are sold at a fair and reasonable rental. So long as each theatre may bid for the films in an atmosphere of free and open competition, that is all that is required. See *Bigelow* v. *Loew's Inc.*, 201 F. 2d 25, 28 (7th Cir. 1952), cert. denied, 345 U. S. 950 (1953); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 139 F. Supp. 809, 812 (N. D. Ill. 1956). Here, the court found that the competitive bidding "was truly competitive and neither exhibitor knew the offers made by the other exhibitor." As we cannot say that this finding by the court was clearly erroneous, the system of competitive bidding in the present case must be upheld. See *Rushing* v. *Metro-Goldwyn-Mayer Distributing Corp.*, 214 F. 2d 542, 544 (5th Cir. 1954).

III.

Finally, appellant complains that its failure to make a demand to the distributors should not be considered fatal to its claim. It presents two reasons for this position: (1) the making of demands would not have had any effect, and (2) the policy of the distributor-defendants was to license "a good picture to the Peekskill only if and when they were unable to get the picture played at the Paramount Theatre." The record contains no adequate evidentiary basis for these contentions, though the record does indicate that the Paramount Theatre had larger daily gross earnings than appellant's Peekskill, and hence that a top-grade picture (normally rented on a basis which includes a percentage of gross earnings) would produce more for the distributor if placed in the Paramount rather than in the Peekskill. Certainly, if a distributor is to be forced to give up a monetary advantage of that sort, he must be confronted with a clear demand—presumably accompanied by an offer of competitive bidding. Perhaps on occasion

circumstances may excuse the lack of demand. Cf. *Congress Building Corp.* v. *Loew's Inc.*, 246 F. 2d 587, 596, 597 (7th Cir. 1957). But such is not the case here. As we have previously held, and recently reiterated: "[P]laintiffs cannot recover damages on account of any failure to obtain feature pictures for first-run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy." *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840, 845 (2d Cir. 1954), quoted and followed in *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533, 536 (2d Cir. 1959); accord, *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952).

For these reasons, the judgment below must be

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of June one thousand nine hundred and fifty-nine.

Present:

Hon. George T. Washington,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Circuit Judges.

ROYSTER DRIVE-IN THEATRES, INC., *Plaintiff-Appellant*

v.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; PARAMOUNT FILM DISTRIBUTING CORP.; WARNER BROTHERS PICTURES DISTRIBUTING CORP.; T.C.F. FILM CORP.; RKO RADIO PICTURES, INC.; LOEW'S INC.; COLUMBIA PICTURES CORP.; UNITED ARTISTS CORPORATION,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIELS FUSARO
Clerk

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Findings of Fact and Conclusions of Law

MURPHY, D. J.

This action having been tried to the court without a jury the following are:

FINDINGS OF FACT

1. This action was instituted on August 4, 1954, by plaintiff under Sections 1, 2, 15 and 26 of Title 15, United States Code.

The Parties

2. The plaintiff, Royster Drive-In Theatres, Inc., was organized in 1949 and at all times herein material its sole stockholders have been Harry L. Royster and his brother-in-law Stephen L. Barutio, president and treasurer, respectively, of the plaintiff.

3. Defendant American Broadcasting-Paramount Theatres, Inc. (AB-PT) is a corporation holding stock in certain companies which operate motion picture theatres, including the Paramount Theatre in Peekskill, New York, and the Bardavon and Stratford Theatres in Poughkeepsie, New York.

4. Defendants Loew's Incorporated, Warner Bros. Pictures Distributing Corporation and Columbia Pictures Corporation are engaged in the business of producing and distributing motion pictures.

5. Defendant United Artists Corporation is engaged in the business of distributing motion pictures produced by others.

6. Defendant RKO Teleradio Pictures, Inc. (sued herein as RKO Radio Pictures, Inc.) was, during the period

involved, engaged in the business of producing and distributing motion pictures.

7. Defendant TCF Film Corporation was dissolved in 1952. Prior to that time it was engaged in the business of producing and distributing motion pictures.

8. Defendant Paramount Film Distributing Corporation is engaged in the business of distributing motion pictures. Prior to December 30, 1949 it was a wholly-owned subsidiary of Paramount Pictures, Inc. On December 30, 1949 Paramount Pictures, Inc. was dissolved. Since that time Paramount Film Distributing Corporation has been a wholly-owned subsidiary of Paramount Pictures Corporation which was organized on or about November 14, 1949 and began doing business on December 30, 1949.

9. Defendant American Broadcasting-Paramount Theatres, Inc. was organized on or about November 14, 1949 and commenced doing business on December 30, 1949 under the name United Paramount Theatres Corporation.

10. There is no corporate relationship between defendant Paramount Film Distributing Corporation and defendant American Broadcasting-Paramount Theatres, Inc., or between Paramount Pictures Corporation and American Broadcasting-Paramount Theatres, Inc.

Ownership of the Theatres

11. Prior to December 30, 1949 the Peekskill Theatre and the Paramount Theatre in Peekskill were operated by Paramount Pictures Theatres Corporation which was then a subsidiary of Paramount Pictures, Inc., which latter corporation was dissolved December 30, 1949.

12. After December 30, 1949 Paramount Pictures Theatres Corporation became a subsidiary of United Paramount Theatres Corporation, and continued to operate the theatres. Paramount Pictures Theatres Corporation sold

the Peekskill Theatre to the plaintiff on April 5, 1950 and ceased to operate it on that date. It has continued to operate the Paramount Theatre in Peekskill throughout the period covered by this suit.

13. United Paramount Theatres Corporation became American Broadcasting-Paramount Theatres, Inc., the defendant named in this action, on February 9, 1953.

14. Royster Drive-In Theatres, Inc. purchased the Peekskill Theatre in Peekskill from Paramount Pictures Theatres Corporation on April 5, 1950 and began to operate it on April 6, 1950. The theatre ceased operating about October 11, 1952.

15. Simultaneously with the purchase of the Peekskill Theatre in Peekskill, N. Y. on April 5, 1950, plaintiff also purchased the lease of the Colonial Theatre in Poughkeepsie, N. Y. The total amount to be paid for the entire transaction was $193,900 which included $100,000 for the Peekskill Theatre, $75,000 for the Colonial lease, plus $18,900 for lease deposits. Only $64,000 of this amount has been paid.

Poughkeepsie

16. On and after April 6, 1950 the Bardavon and Stratford Theatres in Poughkeepsie were operated by a subsidiary of defendant American Broadcasting-Paramount Theatres, Inc. On that date plaintiff began operating the Colonial Theatre in Poughkeepsie and has continued to do so. During the entire period involved in this action pictures were licensed by the exhibitors according to arrangements made between the exhibitors whereby the Colonial and Bardavon Theatres each exhibited a portion of the top quality pictures, and the lesser quality pictures were exhibited at the Stratford Theatre.

17. From time to time throughout the period involved in this action there were changes made by the exhibitors

in the arrangements under which the Colonial and Bardavon each shared the top quality pictures.

18. Plaintiff makes no complaint concerning the manner in which pictures were licensed to its Colonial Theatre in Poughkeepsie.

Peekskill

19. Peekskill has a population of approximately 18,000 people. It is located in Westchester County and is close to a number of communities having motion picture theatres. The shopping draw area of the City of Peekskill extends in a radius of approximately 20 miles on the easterly side of the Hudson river. Included in the area are approximately 36,000 persons in the winter, and approximately 72,000 in the summertime. Poughkeepsie is at least twice as big.

20. Prior to April 6, 1950 the Paramount Theatre had been the theatre in which the better quality pictures had been exhibited on first run in the City of Peekskill.

21. Prior to April 5, 1950 Harry L. Royster supervised the operation of the Paramount and Peekskill Theatres for Paramount Pictures Theatres Corporation.

22. As of April 6, 1950 the appointments of the Paramount Theatre were in good condition. It had 1485 seats and was equipped with a cooling plant.

23. As of April 6, 1950 the Peekskill Theatre was in poor condition; it had no cooling plant; it was in a run-down condition; and it had 961 seats. It definitely was not a first class theatre and it had a poor reputation.

24. Prior to April 6, 1950 the Peekskill Theatre had generally exhibited slough pictures, re-issue pictures, repeats, and C grade pictures. On this policy the Peekskill Theatre had been making money.

25. Certain renovations to the Peekskill Theatre were undertaken sometime during the summer of 1950. These

renovations of the Peekskill Theatre were not completed until September 30, 1950.

26. Prior to September 30, 1950, the Peekskill Theatre was inferior to the Paramount Theatre.

The Period April 6, 1950 to September 30, 1950

27. Plaintiff seeks no damages for any acts of the defendants for the period prior to September 30, 1950.

28. Following plaintiff's acquisition of the Peekskill Theatre, Barutio and Royster visited the exchanges of Loew's, R.K.O., United Artists, and Warner's on April 17, 1950, and Paramount a week later, in an attempt to make arrangements for motion pictures for exhibition in the Peekskill Theatre, but in each instance and at each of the above-named defendants' exchanges they were advised that they could not license any pictures unless and until they received the approval of defendant AB-PT. At Columbia and United Artists, these conversations were had with salesmen of such defendants but who we find had authority to speak for their employer.

29. Thereafter Barutio and Royster visited the offices of AB-PT on April 24, 1950, and advised the representative of that defendant that the above-named distributor defendants had refused to furnish pictures to the Peekskill Theatre unless and until plaintiff obtained a release of the pictures from AB-PT.

30. Defendant AB-PT in response to such complaint read off the names of a number of pictures which it stated it would permit plaintiff to exhibit at the Peekskill Theatre. Such pictures were pictures of Columbia, Loew's, United Artists and Warner's. Thereafter plaintiff visited the offices of the defendant distributors and notified each in turn that they had the permission of defendant AB-PT, whereupon they were authorized to license such picture.

31. That defendants Loew's, R.K.O., Columbia, United Artists, Warner's, Paramount and AB-PT, commencing April 17, 1950 and up to and including May 15, 1950, agreed and conspired with each other to withhold from plaintiff's Peekskill Theatre a fair and reasonable supply of pictures.

32. The purpose and effect of such conspiracy was to prevent plaintiff's theatre from competing effectively with the Paramount Theatre in Peekskill during such period.

33. On or about May 15, 1950, plaintiff retained Liggett-Florin Booking Service as its agent for the licensing and booking of motion pictures. That organization was acting as buying and booking agent for over one hundred theatres served by the New York Exchanges of the various distributors, including the newly opened Hollowbook Drive-In Theatre, a competitor of plaintiff in Peekskill.

34. After the employment of Liggett and Florin neither Barutio nor Royster had any discussion with any representative of any distributor defendant concerning the licensing or booking of motion pictures for the Peekskill Theatre.

35. During the summer of 1950 Florin licensed various pictures for exhibition at the Peekskill Theatre after consultations with representatives of AB-PT to determine which pictures were not going to be sought for the Paramount Theatre.

36. After plaintiff retained Liggett and Florin as its buying agent it was satisfied with the manner in which Universal pictures were licensed for first run exhibition in Peekskill and dismissed Universal from the lawsuit for that reason.

37. During the period of plaintiff's operation of the Peekskill Theatre for which plaintiff seeks damages, Universal Pictures Co., Inc., licensed 64 pictures to the Peek-

skill Theatre and the defendant, Columbia Pictures Corporation, licensed 74 pictures to the Peekskill Theatre. During the period of plaintiff's operation of the Peekskill Theatre for which plaintiff seeks damages, Universal Pictures Co., Inc., licensed 5 pictures to the Bardavon or Colonial Theatres in Poughkeepsie, New York. Of these 5 pictures, 3 were licensed to the Paramount Theatre and 2, or 40%, were licensed to the Peekskill Theatre. During this same period, Columbia Pictures Corporation licensed 18 pictures to the Bardavon or Colonial Theatres in Poughkeepsie, New York. Of these 18 pictures, 10 were licensed to the Paramount Theatre and 8, or 44.5%, were licensed to the Peekskill Theatre.

38. The testimony in regard to a necessity for "clearing" with Paramount Theatres related only to April or May of 1950.

39. Even after the renovation of the Peekskill Theatre which was completed about October 1, 1950, it was conceded that the marquee of the Paramount Theatre was larger than that of the Peekskill; that the entrance of the Paramount was larger than that of the Peekskill; that the waiting space of the Peekskill was approximately one-third of the Paramount; that the lobby of the Peekskill was approximately one-half of that of the Paramount; that the screen of the Paramount was wider than that of the Peekskill; and that the rest rooms at the Paramount Theatre were larger than those of the Peekskill. During the course of renovations, the number of seats in the Peekskill Theatre was reduced from 961 to 866, in contrast to 1,485 seats at the Paramount. The Peekskill Theatre was originally built as a hotel and after a fire in 1918 it was made into a theatre, whereas the Paramount Theatre was built in 1930.

40. A few days prior to September 15, 1950, Florin, Barutio and Royster met with representatives of AB-PT. They advised AB-PT that the renovations of the Peekskill Theatre were also complete. Florin said to Sicignano,

"I want a share of the 'A' product," and told him that if he did not give Florin 'A' product "I am going to get it by myself." Florin explained this testimony by saying that it was the practice for exhibitors to try to work out their problems with the competing exhibitors and that when they got to the point where they could not get anywhere with the opposition, they go to the film companies and that was what he meant by saying that he was going to get pictures himself and was that he would ask for competitive bidding.

41. Competitive bidding was available to the plaintiff at all times during the period of plaintiff's operation for each picture of each defendant-distributor.

42. In competitive bidding a distributor advises each exhibitor of the picture for which offers are solicited. Each exhibitor independently decides the amount which it is willing to offer for the right to exhibit the particular picture and submits an offer to the distributor. The competing offers are evaluated by the distributor and the license to exhibit the picture is awarded to the exhibitor whose offer is believed to present the most satisfactory licensing opportunity.

43. At all times during plaintiff's operation it avoided competitive bidding as long as it thought it could get pictures for exhibition at the Peekskill Theatre in any other way.

44. Prior to September 15, 1950, no representative of the plaintiff ever communicated in writing with any representative of any distributor concerning the licensing or booking of motion pictures for the Peekskill Theatre.

45. On September 15, 1950, Liggett wrote letters to several of the distributor defendants requesting either a split of product or competitive bidding.

46. Competitive bidding was inaugurated and offers were solicited from plaintiff and AB-PT on some pictures.

47. Even assuming that there was evidence of one or more unlawful conspiracies, that evidence was limited to the period ending May 15, 1950, and plaintiff failed to prove that any such conspiracy was the proximate cause of any legal injury to plaintiff, and failed to prove the amount of any damages sustained by it proximately resulting from any such unlawful act.

48. There was no evidence of any unlawful conspiracy after May 15, 1950, and in any event such conspiracy or conspiracies were fully terminated by September, 1950, when plaintiff demanded and was accorded the right to bid competitively for the pictures of the defendant distributors.

The Period October 1, 1950 to December, 1951

49. Plaintiff seeks damages for the period from September 30, 1950 to August 4, 1954, the date of the commencement of this suit.

50. On October 7, 1950, Royster sent Hyman at AB-PT a telegram stating that relations in Poughkeepsie and Peekskill had reached an impasse and expressing the hope that the problems could be straightened out.

51. Lated in October, 1950, Florin and Barutio met with AB-PT. They agreed that the Peekskill Theatre would try an arrangement under which plaintiff would negotiate for the pictures which had played or would play at the Stratford Theatre in Poughkeepsie, which arrangement could be changed by either party at any time.

52. Plaintiff knew what pictures had been exhibited at the Stratford Theatre. It knew the type of pictures it could expect to receive.

53. Within a short time after the meeting with AB-PT in October, 1950, plaintiff withdrew its requests to the distributors for competitive bidding. These requests were

withdrawn solely because of the arrangement with AB-PT as to product in Peekskill.

54. Florin also telephoned representatives of the various distributors and advised them that an arrangement had been made with AB-PT. Florin said that employees of each distributor stated this was satisfactory.

55. There is no evidence that any distributor's acquiescence in the arrangement made in October, 1950, for a division or split of motion pictures in Peekskill was contrary to its best business interests.

56. Apart from actual competitive bidding, there is no evidence as to any communication with any representative of any distributor concerning the licensing of any picture for the Peekskill Theatre after Florin advised various distributors in October, 1950, that plaintiff was withdrawing its request for competitive bidding.

57. There is no evidence that plaintiff, after the theatre was renovated, ever made any demand to any distributor, which demand was refused.

58. The lack of any demand is indicative of the fact that plaintiff preferred to make arrangements with AB-PT, and is a clear indication that the arrangements voluntarily made by plaintiff were satisfactory to it.

59. There is no evidence that any distributor was informed or had knowledge of the manner in which any other distributor proposed to deal or did deal with the Paramount and Peekskill Theatres.

60. No representative of any distributor defendant was present at any time at any meeting between AB-PT and plaintiff.

61. During the six months' period following the October, 1950, meeting with AB-PT, plaintiff did nothing about requesting different product for the Peekskill Theatre.

During that period if a distributor had offered plaintiff a picture which under its arrangement was on the AB-PT split, plaintiff would not have negotiated for that picture for the Peekskill Theatre.

62. During the six months' period following the October, 1950, meeting with AB-PT, plaintiff was happy with the arrangement which it had made with AB-PT; it got the Stratford pictures and it got along fine with the pictures it had agreed to take.

63. In April, 1951, a meeting was held at the Bardavon Theatre in Poughkeepsie between representatives of AB-PT and plaintiff. At that meeting AB-PT advised plaintiff that the Paramount Theatre needed more pictures to operate than it had been playing in the immediately preceding period.

64. During the period from April, 1951, to December, 1951, there is no evidence as to the manner in which licenses for the exhibition of pictures in Peekskill were negotiated.

65. Of the 37 pictures exhibited at the Paramount Theatre in the period from April to December, 1951, which also played the Stratford, six were Universal pictures and eight were pictures distributed by other non-defendant distributors.

The Period from December, 1951 to October, 1952

66. In December, 1951, and January, 1952, plaintiff wrote to the various distributor defendants and requested competitive bidding. Each distributor afforded plaintiff an opportunity to bid competitively for each picture for first-run exhibition in Peekskill.

67. Competitive bidding was truly competitive and neither exhibitor knew the offers made by the other exhibitor.

68. Plaintiff made no complaint as to the award of any picture by any distributor, except the award made by defendant RKO of the picture *Snow White*.

69. The picture *Snow White* was produced by Walt Disney and the award of that picture was subject to the approval of Walt Disney. The Peekskill Theatre offered five days, including Saturday and Sunday, at 37½ per cent of the gross receipts, less the cost of the second feature. The offer of the Paramount Theatre, which was accepted, was four days, including Saturday and Sunday, at 37½ per cent of the gross receipts to $574 per unit and 50 per cent over, less the cost of the second feature. The award of the picture *Snow White* to the Paramount Theatre was clearly justified, since the percentage terms offered were better at the Paramount than at the Peekskill and the offer of one additional day by the Peekskill was insufficient to make up the difference, particularly in view of plaintiff's admission that it took five to seven days at the Peekskill Theatre to produce the film rental which the Paramount could do in two or three days.

70. There is no evidence that AB-PT ever overbid for any picture.

71. Competitive bidding is a fair and reasonable method of resolving conflicting demands of competing exhibitors for a license to exhibit a particular picture or pictures on the same run.

72. In April, 1952, Barutio approached AB-PT to work out some arrangement between the two exhibitors whereby competitive bidding would again be eliminated. Barutio asked AB-PT for a split of pictures in Peekskill—some pictures that plaintiff "could call our own." At that time some further arrangement was made between plaintiff and AB-PT. There is no evidence that any defendant distributor was notified of this arrangement.

73. Shortly thereafter the distributor defendants were notified by similar letters sent by the plaintiff that plaintiff desired to terminate competitive bidding.

74. Plaintiff discontinued competitive bidding because of some sort of an arrangement it had made with AB-PT.

75. Plaintiff closed the Peekskill Theatre on October 11, 1952, and since that time has never operated the theatre.

76. During the period of plaintiff's operation of the Peekskill Theatre for which plaintiff seeks damages, defendant Columbia Pictures Corporation licensed 98 pictures in the city of Peekskill, New York, 74 of which played at the plaintiff's Peekskill Theatre.

77. During the period of plaintiff's operation of the Peekskill Theatre for which plaintiff seeks damages, Columbia Pictures Corporation licensed to the plaintiff's theatre more than half of the Columbia pictures in each of the following categories:

a. Total pictures played at Peekskill, New York;

b. Total pictures played at the Stratford Theatre, Poughkeepsie, on the first half of the week;

c. Total pictures played at the Stratford Theatre, Poughkeepsie, as the top half of a double bill;

d. Total pictures played at the Stratford Theatre, Poughkeepsie, as the top half of a double bill during the first half of the week.

78. All United Artists license agreements required the approval of the representative of the producer of the picture.

79. During the period April 6, 1950 to October 11, 1952, United Artists licensed 63 pictures for exhibition in the city of Peekskill, New York. Of these 43 were

licensed for exhibition at the Peekskill Theatre and 20 were licensed for exhibition at the Paramount Theatre.

80. Plaintiff has failed to prove that it suffered any damage as the result of any act of the defendants or any of them in violation of law, and has further failed to prove the amount of its damages, if any.

81. Economic conditions caused a sharp decline in total admission receipts for the two conventional theatres in Peekskill during the period in suit, a decline which was also felt nationally and was marked by the closing of a number of theatres in the Peekskill, Poughkeepsie and New York areas.

82. The declining total receipts for both conventional theatres in Peekskill appear from the combined admission receipts for the Peekskill and Paramount Theatres:

1948	$338,043
1949	292,259
1950	244,221
1951	215,632
1952	186,389

The sharp decline in admission receipts was felt by AB-PT's Paramount Theatre as well as by the Peekskill Theatre. In 1952 the Paramount Theatre's total admission receipts had dropped to less than half of what they had been in 1948.

83. Among the reasons for this decline in receipts were:

(1) The percentage of television sets in the Peekskill area increased from 31.9% in 1950 to 70% in 1952, or more than doubled during the period of plaintiff's operation of the Peekskill Theatre.

(2) There were a number of changes in the competitive situation in Peekskill in the same period.

Most significant was the opening of the Hollowbrook Drive-In, on May 27, 1950, immediately following plaintiff's takeover of the Peekskill Theatre. In addition to this was a move-up in the playing time of the treatres in Ossining. Advertisements in the Peekskill Evening Star showed that in February, 1952, the Victory Theatre in Ossining was playing "The Light Touch" even before the Peekskill and in June, 1951, the Fishkill Drive-In was playing "On the Riviera" at the same same time as the Paramount Theatre.

84. When plaintiff converted the Peekskill Theatre from a slough house, it became committed to expenses which were way out of line for the receipts it could hope to obtain, particularly in a period of declining grosses. A tabulation of quarterly expenses illustrates the substantial increase in operating costs under plaintiff's operation of the Peekskill Theatre:

Operating Costs for Peekskill Theatre by Quarters

	1949	1950	1951	1952
1st Quarter	$16,335.82	$16,959.76	$24,530.95	$25,754.95
2nd Quarter	16,717.24	17,939.48	25,644.51	26,103.31
3rd Quarter	16,625.48	28,388.19	27,725.25	27,198.39
4th Quarter	16,908.75	27,554.24	28,205.43	....

85. Plaintiff's operating expenses jumped approximately $10,000 per quarter after the 2nd quarter of 1950 when plaintiff took over the operation of the Peekskill Theatre (an annual increase of some $40,000). In part, this is explained by an increase in film rentals for better quality pictures, which went up about $3,000 per quarter. It is further explained by a disproportionate increase in management and house salary expenses, which also increased approximately $3,000 per quarter whereas the Paramount expenses were being reduced during the same period. The balance of the increase appears to stem from

carrying charges for refurbishing the theatre, which apparently were financed by loans rather than out of capital. The expenses during the last full quarter of AB-PT's operation amounted to $16,959.76, while plaintiff's quarterly expenses after its first quarter of operating ranged between $24,530.95 and $28,388.19.

86. A comparison of the gross admission receipts (less film rental) against the house expense for the exhibition of each of the programs which Barutio designated as "A" showed that out of 15 such programs, plaintiff made a profit on only two: $81.03 on the showing of *David and Bathsheba*, exhibited at advanced admission prices, and $197.03 on the Labor Day weekend showing of *The Big Sky*. The net losses on all 15 pictures totalled $5,533.89.

87. A similar analysis of the pictures which Mr. Royster testified represented the true "grossing potential" of the Peekskill Theatre, shows the same result, a loss on all but two pictures.

Program	Admission Receipts Less Film Rental	House Expense	Net Profit or (Loss)
Sleeping City / *Triple Trouble*	$ 953.50	$1,245.20	$(291.70)
David and Bathsheba	1,061.07	980.04	81.03
Sailor Beware	2,179.19	2,278.08	(98.89)
African Queen	1,463.93	1,493.80	(29.87)
We're Not Married / *Confidence Girl*	1,011.11	1,232.64	(221.53)
The Big Sky	1,737.83	1,540.80	197.03

88. Even on these selected pictures which Mr. Royster claimed to represent the true "grossing potential" of the Peekskill Theatre, plaintiff did not operate on a profitable basis. The only profitable programs in the entire group are the same ones included on Barutio's list: the advanced

price performance of *David and Bathsheba* and the Labor Day weekend program of *The Big Sky*.

89. The per unit net receipts on Mr. Royster's selected "grossing potential" pictures at the Peekskill Theatre amount to $148.68, while the unit net receipts of *all* programs at the Paramount Theatre amount to $156.48. This is evidence of the advantages of the Paramount Theatre over the Peekskill in terms of location, age, size and reputation, and the effect of these factors in limiting the Peekskill's grossing ability and, ultimately, its ability to survive.

90. Plaintiff did not operate profitably even on the pictures which its expert, Dollinger, classified as "AA" and "AAA." The following are the results of the exhibition of those pictures at the Peekskill Theatre:

Program	Dollinger's Classification	Admission Receipts Less Film Rental	House Expense	Net Profit or (Loss)
Red Shoes	AAA	$ 877.55	$1,184.48	($306.93)
David and Bathsheba	AA	1,061.07	980.04	81.03
Sailor Beware	AA	2,179.19	2,278.08	(98.89)
Death of a Salesman	AA	482.03	1,281.42	(799.39)
The African Queen	AA	1,463.93	1,493.80	(29.87)
Song in My Heart	AA	887.87	1,493.80	(605.93)

91. The Paramount Theatre could, and did produce more film rental for the distributor defendants than the Peekskill Theatre. The Peekskill Theatre played pictures which Dollinger rated as AAA or AA. These produced a film rental of $5,148.24. The per unit film rental on the AAA was $61.69 and on the AA pictures $91.27. The Paramount Theatre played pictures so classified by Dollinger for a total film rental of $22,565.84. The per unit film rental on the AAA pictures was $231.20 and on the AA pictures $105.82.

92. There is a complete absence of any proof of any causal connection between any wrong and damage, if any, to the plaintiff.

93. There is a complete absence of any proof as to the quantum of plaintiff's damage, either from any claimed horizontal conspiracy or one or more vertical conspiracies to restrain or monopolize trade in motion pictures in Peekskill.

94. There is no evidence as to the identity of the pictures which the Paramount Theatre exhibited and which the plaintiff claims it was entitled to exhibit.

95. There is no evidence as to what the gross receipts of the Peekskill Theatre might have been or what film rental it might have paid if it had exhibited pictures which the Paramount Theatre exhibited and which plaintiff claims it was entitled to exhibit.

96. It would be improper in this case to measure the amount of plaintiff's damage by subtracting from the gross receipts, less film rental, of the Paramount Theatre the gross receipts, less film rental, of the Peekskill Theatre and awarding the difference as the plaintiff's damage, since the result of this attempted calculation would be to place the Peekskill Theatre in the position occupied by the superior Paramount Theatre and to place the Paramount Theatre in the allegedly disadvantageous position occupied by the Peekskill Theatre.

97. It would also be improper to measure damage to the plaintiff in this manner, since plaintiff conceded that it would take the Peekskill Theatre five to seven days to gross as much as the Paramount Theatre could gross in two or three days.

98. In licensing its pictures for exhibition in the theatres in Peekskill, New York, during the period for which damages are claimed, there is no evidence that each of the distributor defendants did not act independently, in accord-

ance with its own best business judgment, and without consultation or agreement with any other distributor defendant.

99. There is no evidence that plaintiff ever offered any distributor any guarantee for any pictures, except during competitive bidding.

100. There is no evidence that the Paramount Theatre ever licensed more pictures than it actually needed to operate.

101. There is no evidence of any horizontal conspiracy between any two or more of the defendants during the period for which damages are sought by the plaintiff.

102. There is no evidence of any vertical conspiracy between any distributor defendant and defendant AB-PT during the period for which plaintiff seeks damages.

103. The classification of pictures is not an exact science and pictures will be classified differently by different experts and for different theatres.

Conclusions of Law

1. The plaintiff has failed to prove it has suffered any legal injury proximately resulting from any conspiracy.

2. Plaintiff has failed to prove the amount of its claimed damage.

3. Plaintiff's failure to make any demand on any distributor defendants after the renovation of the Peekskill Theatre is fatal to plaintiff's claim.

4. Defendants are entitled to judgment of dismissal upon the merits with prejudice, together with their costs and disbursements herein and the clerk is directed to enter judgment accordingly.

Thos. F. Murphy
U. S. D. J.

Dated, New York, N. Y., September 9, 1958.

Final Judgment

All parties having appeared by counsel and having waived trial by jury, this cause regularly came on for trial before Hon. Thomas F. Murphy without a jury, and, plaintiff having completed the presentation of its evidence, the defendants having moved for a dismissal on the ground that upon the facts and the law the plaintiff had shown no right to relief, and argument having been had thereon, and the Court having granted said motion, and having filed its Findings of Fact and Conclusions of Law directing entry of judgment in favor of defendants against the plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED that the action be dismissed on the merits and that the defendants recover their costs, to be taxed.

ENTER:

THOS. F. MURPHY

United States District Judge

Date: New York, N. Y.
Sept. 9, 1958

Judgment entered Sept. 10, 1958.

HERBERT A. CHARLSON,
Clerk.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 377

ROYSTER DRIVE-IN THEATRES, INC.,

Petitioner,

v.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; WARNER BROTHERS PICTURES DISTRIBUTING CORPORATION; T. C. F. FILM CORPORATION; RKO RADIO PICTURES, INC.; LOEW'S INC.; COLUMBIA PICTURES CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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October 1, 1959

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 268 F. 2d 246, and is printed as Exhibit A to the Petition, ("Pet.") at pages 1a *et seq.*

The District Court rendered no opinion, but made Findings of Fact and Conclusions of Law, ("F."), which are not reported, but are printed as Appendix B to the Petition at pages 12a *et seq.*

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered June 8, 1959 and the Petition for Certiorari was filed September 4, 1959.

Question Presented

The only question presented by the Petition is whether certain basic findings of fact by the Trial Court, made in a non-jury action pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, were clearly erroneous. The findings followed the granting of a motion by Respondents to dismiss at the close of Petitioner's case, pursuant to Rule 41(b), and were unanimously affirmed by the Court of Appeals. Those findings were, in brief, that there was no evidence of any conspiracy in violation of law during the period for which damages were sought, (F. 101-2, Pet. p. 30a); no evidence of any causal connection between any wrong and damage, if any, to the Petitioner, (F. 92. Pet. p. 29a), and no proof as to the amount of damages. if any, (F. 93, Pet. p. 29a).

Statement

This was a private civil action by Petitioner against Respondents for damages claimed to have resulted from an alleged violation of Sections 1, 2, 15 and 26 of Title 15 U. S. Code, (F. 1, Pet. p. 12a). Petitioner sought damages for the period from September 30, 1950 to August 4, 1954, (F. 49, Pet. p. 20a), and did not seek damages for any acts of the Respondents prior to September 30, 1950.

Petitioner was the owner and operator of the Peekskill Theatre in Peekskill, New York, from April 6, 1950, (F.

14, Pet. p. 14a). Respondent American Broadcasting Paramount Theatres Inc., ("AB-PT"), through a subsidiary, Paramount Pictures Theatres Corporation, owned and operated the Paramount Theatre in Peekskill prior to and during Petitioner's operation of the Peekskill Theatre, (F. 3, 9, 11, 12, 13, Pet. p. 12a-14a). The other Respondents are or were distributors of motion pictures, (F. 4, 5, 6, 7, Pet. p. 12a-13a). Prior to the purchase by Petitioner of the Peekskill Theatre from Respondent AB-PT's subsidiary, the Paramount Theatre had been the theatre in Peekskill in which the better quality pictures had been shown on first run, (F. 20, Pet. p. 15a). Petitioner's Peekskill Theatre was in poor condition, without a cooling plant, and with only about 64% as many seats as were in Paramount Theatre,—961 seats in the Peekskill Theatre to 1,485 seats in the Paramount Theatre. The Peekskill Theatre was not a first class theatre and it had a poor reputation, (F. 22, 23, Pet. p. 15a). Prior to Petitioner's acquisition of the Peekskill Theatre, it had generally exhibited the poorer quality pictures, (F. 24, Pet. p. 15a). While renovations of the theatre were undertaken by Petitioner in the summer of 1950, the renovations were not completed until September 30th, (F. 25, Pet. p. 15a-16a). Prior to September 30th, the Peekskill Theatre was inferior to the Paramount Theatre, (F. 26, Pet. p. 16a), and even after that date it was considerably smaller and less modern than the Paramount Theatre, (F. 39, Pet. p. 18a).

Petitioner's representatives testified that during the period from April 6, 1950 to May 15, 1950, they were unable to license pictures from the distributor-respondents for exhibition in the Peekskill Theatre unless they first obtained a release of the pictures from AB-PT, (F. 29, Pet. 16a).

They obtained such releases and thus got pictures for the theatre during that period, (F. 30, Pet. p. 16a).*

The Trial Court found that during this period from April 17 to May 15, 1950, Respondents had agreed and conspired to withold a fair supply of pictures from the Peekskill Theatre, (F. 31-32, Pet. p. 17a). While these findings were not appealed from, the Court of Appeals questioned them, saying:

> "The trial court's finding of a conspiracy in the initial period before September 30, 1950, appears to have been largely based on evidence that defendants followed like policies with respect to appellant, i.e., each distributor was unwilling to negotiate for a particular film unless and until notified that the Paramount Theatre did not wish to show it. No cross-appeal was taken from the judgment, and appellees do not contest this finding in this court. With respect to the defendant AB-PT, there is little or no evidence that it sought to drive appellant out of business; rather, it appears to have been interested in maintaining its own theatre as the leading one in the community." (Pet. p. 8a).

In any event, the Trial Court found that, even assuming that there was evidence of some conspiracy, that evidence was limited to the period ending May 15, 1950, and that the Petitioner had failed to prove that any such conspiracy had caused it damage, (F. 47, Pet. p. 20a). The Court further found that there was no evidence of any conspiracy after May 15, 1950, and that, in any event, any conspiracy had fully terminated by September, 1950, (F. 48, Pet. p. 20a), which was prior to the time for which damages were sought.

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*The evidence discloses that many of these pictures had been contracted for by AB-PT when it was operating the Peekskill Theatre (Defendants' Appendix to Brief in the Court of Appeals, p. 35a-36a; 63a; Ex. 18, p. 168a).

As of May 15, 1950, the licensing and booking of pictures for the Peekskill Theatre was taken over for Petitioner by Liggett-Florin Booking Services, (which also acted as a buying agent for over 100 theatres, including a competitor of the Peekskill Theatre, the Hollowbrook Drive-In Theatre, outside of Peekskill, (F. 33, Pet. p. 17a)). Thereafter all dealings for pictures for the Peekskill Theatre were conducted by Messrs. Liggett or Florin, and during the summer of 1950 Florin licensed pictures for the Peekskill Theatre after consulting with Respondent AB-PT to determine what pictures that company was not going to seek for its Paramount Theatre, (F. 34-35, Pet. p. 17a). There was no testimony that after May, 1950 there was any necessity for "clearing" with AB-PT before the distributors would license pictures for exhibition in the Peekskill Theatre, (F. 38, Pet. p. 18a), such as Petitioner's representatives had testified had been the case prior to the hiring of the Liggett-Florin agency, (F. 28, Pet. p. 16a), and which testimony had formed the sole basis of the Trial Court's findings of the existence of a conspiracy prior to the advent of Liggett and Florin, (F. 31-2, Pet. p. 17a).

The Trial Court found that competitive bidding was always available to Petitioner for each picture of each respondent-distributor, (F. 41, Pet. p. 19a). Competitive bidding was found by the Court to be a fair and reasonable method of resolving conflicting demands of competing exhibitors for a license to exhibit a picture, (F. 71, Pet. p. 23a). Competitive bidding was found to be a procedure pursuant to which a distributor advises each exhibitor of the picture for which offers are solicited. Each exhibitor then independently decides the amount of his bid and submits an offer to the distributor. The offers are evaluated by the distributor, and the picture is awarded to the exhibitor whose offer is believed by the distributor to present the most satisfactory licensing opportunity, (F. 42, Pet. p. 19a).

The Trial Court found that Petitioner avoided competitive bidding at all times, as long as it thought it could get a picture in any other way, (F. 43, Pet. p. 19a), although that method was always available, (F. 41, Pet. p. 19a).*

The Trial Court found that there was no evidence that Petitioner, after the Peekskill Theatre was renovated, ever made any demand to any distributor, which demand was refused, (F. 57, Pet. p. 21a).

Petitioner first demanded competitive bidding on September 15, 1950, (F. 45, Pet. p. 19a). Its demands were granted and offers were solicited by the distributors from the Petitioner, (F. 46, Pet. p. 19a). However, in October, 1950, Petitioner's representatives made an agreement with AB-PT for a division or "split" of pictures pursuant to which Petitioner agreed to negotiate for pictures which had played or would play at the Stratford Theatre in Poughkeepsie, a type of picture with which Petitioner was familiar, (F. 51-52, Pet. p. 20a).** Following this agreement, Florin, on behalf of Petitioner, advised Respondent-distributors of the making of the "split", and withdrew Petitioner's request for competitive bidding, (F. 53, 54, Pet. p. 20a-21a). There was no evidence that any distributor's acquiesence in the arrangement for a "split" made by Petitioner with AB-PT had been contrary to the distributor's best business interests, (F. 55, Pet. p. 21a). Petitioner's request to terminate bidding was made solely because of the arrangement between Petitioner and AB-PT, (F. 53, Pet. p. 20a).

Petitioner made no request of any distributor for different product than it had agreed to take pursuant to the

*Florin testified that he had told AB-PT that if it did not "give" him some "A" product, he would "get it by myself," i.e., that he would ask the distributors to institute competitive bidding, (F. 40, Pet. p. 18a; Appendix to Appellees' Brief in the Court of Appeals, p. 145a, 158a-159a).

**Herein called "the Stratford pictures".

arrangement with AB-PT, (F. 56, 57, 61, Pet. p. 21a). Petitioner was happy with the arrangement, got the pictures it agreed to take, (F. 62, Pet. p. 22a), and in fact would not have taken any picture on AB-PT's side of the "split" if any such picture had been offered to it, (F. 61, Pet. p. 21a-22a). There was no evidence that any distributor was informed or had any knowledge of the manner in which any other distributor proposed to or did deal with either the Paramount Theatre or the Peekskill Theatre, (F. 59, Pet. p. 21a).

In April, 1951, Respondent AB-PT advised Petitioner that the Paramount Theatre needed more pictures than it had been playing, (F. 63, Pet. p. 22a), and thereafter some of the so-called "Stratford pictures" were exhibited in the Paramount Theatre, (F. 65, Pet. p. 22a). The October, 1950 "split" that had been arranged was subject to cancellation by either party at any time, (F. 51, Pet. p. 20a).

No representative of any distributor-Respondent was present at any time at any meeting between AB-PT and Petitioner, (F. 60, Pet. p. 21a).

In December, 1951, Petitioner again demanded competitive bidding. Each distributor granted the demand and again instituted competitive bidding between the two theatres, (F. 66, Pet. p. 22a). The competitive bidding which then ensued was fairly conducted and truly competitive, (F. 67, Pet. p. 22a). There was no evidence that during the competitive bidding period, AB-PT ever overbid for any pictures, (F. 70, Pet. p. 23a), and there was no evidence that it ever licensed more pictures than it actually needed to operate its Paramount Theatre, (F. 100, Pet. p. 30a). The competitive bidding which was conducted was "truly competitive", (F. 67, Pet. p. 22a).

In April, 1952, Petitioner's representatives testified that they again made an agreement for a "split" of pictures with AB-PT, and that as a result they again withdrew the request

for competitive bidding. (F. 72, 73, 74, Pet. p. 23a-24a). There was no evidence that any distributor was notified of this agreement to "split" the pictures. (F. 72, Pet. p. 23a). Petitioner again discontinued bidding, and did so because of its arrangement with AB-PT. (F. 73, 74, Pet. p. 24a).

Petitioner closed the Peekskill Theatre on October 11, 1952 and has not operated it since that time. (F. 75, Pet. p. 24a).

The Trial Court found that economic conditions had caused a sharp decline in the admission receipts of both the Paramount and Peekskill Theatres, (F. 81, Pet. p. 25a). The combined receipts of the two theatres during the period in suit, (1950-1952), had declined from $244,221 to $186,389, (F. 82, Pet. p. 25a). The Court found that among the reasons for the decline in receipts were the increase in television sets in the Peekskill area, the opening of new theatres in the area, and the "move-up" of other theatres in their playing positions. (F. 83, Pet. p. 25a-26a). It also found that Petitioner had become committed to operating expenses which were way out of line for the receipts that it could hope to obtain, particularly in a period of declining grosses. It found that Petitioner's operating expenses increased approximately $10,000 per quarter after Petitioner took over the operation of the theatre, some of which was attributable to management and salary increases, (F. 84, 85, Pet. p. 26a). The Court also made findings to the effect that the "grossing potential" of the Paramount Theatre was greater than the "grossing potential" of the Peekskill Theatre, and that the former could and did produce more film rental for the distributor-Respondents than the Peekskill Theatre could and did. (F. 86-91, 97, Pet. p. 27a-29a).

The Trial Court found that there was no evidence as to what the gross receipts of the Peekskill Theatre might have

been, or what film rental it might have paid to distributors, if it had exhibited the pictures which the Paramount Theatre exhibited and which Petitioner claimed it was entitled to exhibit, (F. 95, Pet. p. 29a). In fact, it found that there was no evidence as to the identity of any picture which Petitioner claims it was entitled to exhibit and which the Paramount Theatre did exhibit, (F. 94, Pet. p. 29a).

Petitioner had attempted to estimate its damages by the method of subtracting from the gross receipts less film rental of the Paramount Theatre, the gross receipts less film rental of the Peekskill Theatre, and claiming the difference as its damages. The Trial Court held that this was an improper measure of damages, since the result would be to place the Peekskill Theatre in the position occupied by the superior Paramount Theatre, and to place the Paramount Theatre in the allegedly disadvantageous position occupied by the Peekskill Theatre, (F. 96, Pet. p. 29a). The Court found that it would have taken the Peekskill Theatre five to seven days to gross as much as the Paramount Theatre could gross in two or three days, (F. 97, et. p. 29a). It was found that in licensing pictures for exhibition in both of the theatres in Peekskill during the period for which damages were claimed, there was no evidence that each of the distributor-Respondents did not act independently in accordance with its best judgment, and without consultation or agreement with any other distributor-Respondent, (F. 98-99, Pet. p. 30a). After making the foregoing findings, the Trial Court made the ultimate findings that there was no evidence of any horizontal or vertical conspiracy during the period for which damages were sought by the Petitioner, (F. 101-102, Pet. p. 30a), and concluded that Petitioner had failed to prove that it had suffered any legal injury resulting from any conspiracy, and that it had failed to prove the amount of its claimed damages.

The Court further found that the Petitioner, after the Peekskill Theatre had been renovated on September 30, 1950, had never made any demand for any picture upon any distributor which had been refused, (F. 57, Pet. p. 21a). It found that apart from actual competitive bidding, there was no communication by Petitioner with any distributor-Respondent concerning the licensing of any picture for the Peekskill Theatre after Florin had advised the distributors in October, 1950 that it was then withdrawing its request for competitive bidding, (F. 56, Pet. p. 21a). From these findings the Court concluded that Petitioner's failure to make any demand on any distributor-Respondent after the renovation of the theatre was fatal to its claim, (Conclusion 3, Pet. p. 30a).

Argument

Running throughout the petition is a basic attempt to contort this case into one of far reaching consequences. Such is not the case. As the findings clearly show, this is a case of an inferior theatre which, when offered free competition, always shunned it. Petitioner is attempting to use the Anti-Trust Laws to obtain for an economically unsound venture a preferred position free from competition.

The dominant purpose of the Anti-Trust Laws is to free the channels of trade of unreasonable restraints so that there may be free competition. It is not their purpose to impose judicial restraints so that certain businesses are freed from competition.

In motion picture anti-trust cases, the courts have consistently recognized that the most an exhibitor is entitled to is a fair opportunity to compete, and that no exhibitor is entitled to a preferred position free from competition. *Bigelow* v. *RKO Radio Pictures*, 162 F. 2. 520, 524 (7th Cir.,

1947), cert. den. 332 U. S. 817 (1947); *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2. 561, 572 (7th Cir., 1951), cert. den. 342 U. S. 909 (1952); *Loew's Inc.* v. *Milwaukee Towne Corp.*, 201 F. 2. 19, 23 (7th Cir., 1952), cert. den. 345 U. S. 951 (1951).

Petitioner was afforded a fair opportunity to compete. Its request made about September 15, 1950 for competitive bidding was promptly granted, (Pet. p. 8; F. 46, Pet. p. 19a). Petitioner shunned free and open competition and preferred to license pictures pursuant to arrangement with its competitor, (F. 43, Pet. p. 19a; F. 50-55, 62-64; Pet. p. 20a-22a). Petitioner made no request to any distributor for anything further until December, 1951 when it again requested competitive bidding which each distributor promptly granted. (F. 66, Pet. p. 22a). In April 1952 Petitioner discontinued competitive bidding because of some arrangement which it made with its competitor, (F. 72-74, Pet. p. 23a-24a).*

Petitioner now advances the argument that the Peekskill Theatre was divested by Respondent AB-PT pursuant to a decree in order to establish "substantial motion picture theatre operating competition" in Peekskill, N. Y., (Pet. p. 13) and that competitive bidding was not a solution to the problem, (Pet. pp. 17-19).

Carrying Petitioner's argument to its logical conclusion, it must be Petitioner's argument that for some undisclosed reason it was entitled to receive pictures free from competition since it could not successfully compete. Thus, the failure of Petitioner to be protected from free competition by some artificial restraint of trade is now argued to frustrate a decree which sought to establish competition.

*In the face of these findings, it is shocking to find the unsupported and unsupportable statement in the Petition, (p. 15): "And petitioner's evidence clearly indicated that after September 15, 1950, the respondents continued to discriminate in furnishing pictures for exhibition at petitioner's Peekskill Theatre and that petitioner was injured as the result of that discrimination."

Petitioner's First Point

Petitioner's first point is that the Court below erred in holding that Petitioner had the burden of proving that the short-lived conspiracy found by the Trial Court to have existed between April 17, 1950 and May 15, 1950 continued thereafter, (Pet. p. 14-17). The fact is, however, that there is nothing in the record to show that the Trial Court did place any such burden on Petitioner. The Court decided the case pursuant to a motion made by Respondents at the close of Petitioner's case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. No evidence was, therefore, offered or received by Respondents. On a motion pursuant to Rule 41(b) in a non-jury case such as this one was, the Court is authorized to determine the facts and the law, and render judgment against the plaintiff on the ground that upon the facts and the law the plaintiff has shown no right to relief.*

Under this Rule proceedings are markedly different from proceedings on a motion for a directed verdict in a jury trial. In the latter case the court considers all of the evidence in the light most favorable to the plaintiff and may dismiss only if, as a matter of law, the evidence is insuffi-

*Rule 41(b) provides in pertinent part as follows:

"* * * After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court, without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

cient to justify a verdict for the plaintiff. In a non-jury case, however, the question under this Rule is not whether there was sufficient proof to carry the case to the jury. The court has the right to apply its own judgment to the plaintiff's evidence and to make its own findings of fact, even though there is a conflict in the plaintiff's case or even if there are two possible inferences to be drawn from plaintiff's evidence.* 5 *Moore, Federal Practice*, 2d Ed. Par. 41.14(3)(4). In *Huber* v. *American President Lines*, 240 F. 2d 778, 779 (2d Cir. 1957), the Court of Appeals unanimously affirmed the District Court's dismissal of a complaint on motion made at the close of the plaintiff's evidence, where the trial judge rejected some of the plaintiff's proof, and had made findings of fact from which he had concluded that there was no liability.

Petitioner's argument under this point is based on a supposed rule of law that there is a presumption that a conspiracy, once shown, continues until it is shown to be terminated, and that this rule required Respondents to offer proof by way of an affirmative defense. This argument, of course, overlooks the fact that during the presentation of Petitioner's case Respondents did introduce a considerable amount of evidence by way of documentary exhibits and cross-examination of Petitioner's witnesses. Indeed, the Trial Judge asked many searching questions of Petitioner's witnesses, viz. Appendix to Appellees' Brief in the Court of Appeals, p. 35a; 56a; 58a; 69a; 111a; 112a; 118a; 119a; 138a; 153a; 154a; 157a; 159a. Respondents' proof introduced during the Petitioner's case effectively proved the absence of any conspiracy, certainly after May 15, 1950. The Court found, in deciding the case under Rule 41(b), that the short-lived

*If the facts give equal support to each of two conflicting inferences, the plaintiff fails, *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339.

conspiracy existing for the few days in April and May, 1950, had in fact terminated prior to the time when Petitioner's alleged damage commenced, (F. 47, 48, Pet. p. 20a). These findings of the non-existence of this conspiracy during the damage period were not based solely on the fact that Respondents had instituted competitive bidding at Petitioner's request, but were on the whole record as to the manner in which Petitioner and Respondents conducted themselves and pictures were licensed after the advent of Liggett-Florin Booking Service on May 15, 1950. Findings in this respect, it will be recalled, were that following the employment of Liggett and Florin, no representatives of Petitioner except Messrs. Liggett and Florin had any discussion with any distributor-Respondent, (F. 34, Pet. p. 17a), and that during the period until September 30, 1950, Florin licensed pictures for the Peekskill Theatre only after himself determining that they were not going to be sought by AB-PT for exhibition in the Paramount Theatre, (F. 35, Pet. p. 17a).

In this connection Findings No. 57 and 58, (Pet. p. 21a), are of particular importance. There was no evidence that Petitioner, after the theatre was renovated, ever made any demand to any distributor, which was refused, (F. 57, Pet. p. 21a). The lack of any demand is indicative of the fact that Petitioner preferred to make arrangements with Respondent AB-PT, and is a clear indication that the arrangements voluntarily made by Petitioner were satisfactory to it, (F. 58, Pet. p. 21a). These findings were fully supported by the evidence. They, coupled with the findings as to competitive bidding, clearly show that certainly no conspiracy existed during the damage period and that the short-lived conspiracy, as to which the Court of Appeals questioned the findings, had terminated. The Trial Court made its detailed findings on the whole record before it. Those findings are to the effect that there

was no conspiracy after May 15, 1950; that the evidence of conspiracy was limited to the period ending May 15, 1950, and that Petitioner had failed to prove that any conspiracy was the proximate cause of any legal injury. The Court of Appeals found that the Trial Court's findings—over all—were adequate and soundly based, particularly with respect to the portions from which the Petitioner had appealed, and that none of the findings were clearly erroneous, and thus not reversible under Rule 52(a) of the Federal Rules of Civil Procedure, (Pet. p. 7a). The Court of Appeals, of course, stated that in this case, as in its earlier case, *Webster Rosewood Corp.* v. *Schine Chain Theatres,* 263 F. 2d 534 (CA 2, 1959), cert. den. 360 U. S. 912 (1959), the burden was on Petitioner, but all that it held was that the District Court *could* properly find that that burden of proving all of the elements of a private cause of action, i.e., the existence of a conspiracy, legal injury proximately resulting therefrom, and the fact and amount of damages, was not sustained—not that it actually had placed any other burden on Petitioner. Petitioner's argument, therefore, that the approval by the Court below was predicated on the belief that the burden lay entirely on Petitioner to prove that the short-lived conspiracy found to have been in existence continued, is not in accordance with what the Court actually determined.* There is, however, responsible authority for the fact that the burden is and should be on the plaintiff in a situation such as in the case at bar. *Lawler* v. *National Screen Service Corp.*; 3rd Cir. August 27, 1959, Appeal No. 12793, 1959 CCH Trade Cases ¶ 69,446 (not yet officially reported), *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc., supra.*

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*The cases cited by Petitioner at page 16 of the Petition are all criminal cases, most having to do with the obligation of a conspirator to show that he has withdrawn from a continuing conspiracy.

The fact is that it is not really a question of who has the burden of showing that a conspiracy did or did not continue. The real question is where did the burden lie of showing a violation of the Anti-Trust Laws which proximately caused damage. This burden was always on Petitioner. The gist of a private cause of action under the Anti-Trust Laws is not a conspiracy, but is the damage caused by some act of the conspirators. *Park In Theatres, Inc.* v. *Paramount-Richards*, 90 F. Supp. 722; aff. 185 F. 2nd 407, cert. den. 341 U. S. 950 (1951); *Steiner* v. *20th Century-Fox Film Corp.*, C. A. 9 (1956), 232 F. 2nd 190, 193-4.

Here Petitioner claimed no damage from the only conspiracy found to have existed, and proved no damages from any overt act in violation of law occurring during the period for which damages were claimed.

Petitioner's Second Point

Petitioner's second point is entirely without substance. It urges that the decision of the Court below "* * * stands for the unsupportable proposition that, irrespective of particular market factors, the availability of competitive bidding *per se* immunizes conspirators from liability for losses suffered by an independent exhibitor in the course of seeking a fair and reasonable supply of premium pictures", (Pet. p. 19).

The decision, of course, stands for no such proposition, and the argument ignores all of the findings of fact which formed the basis for the decision. The Courts below have *not* ignored market factors, (viz. F. 22-26, Pet. p. 15a-16a; F. 39 Pet. p. 18a; F. 47-8 Pet. p. 20a; F. 63, Pet. p. 22a; F. 81-91, Pet. p. 25a-28a; F. 103, Pet. p. 30a); they have ***not*** held that the availability of competitive bidding ***per se*** immunizes anyone, and have *not* found that Petitioner suf-

fered any losses from any violation of law, (viz. F. 27-30, Pet. p. 16a; F. 33-35, Pet. p. 17a; F. 36-38, Pet. p. 17a-18a; F. 45-6, Pet. 19a; F. 49-62, Pet. p. 20a-22a; F. 98-102, Pet p. 29a-30a; and F. 80, Pet p. 25a; F. 92-97 Pet. p. 29a).

The Trial Court's findings were that competitive bidding, as conducted during each of the periods when Petitioner requested it, "was truly competitive and neither exhibitor knew the offers made by the other exhibitor", (F. 67, Pet. p. 22a). The Court found that Petitioner made only one complaint as to the award of a picture during the periods of competitive bidding, and that in this case the award of the picture to AB-PT was "clearly justified", (F. 68-9, Pet. p. 23a). It found that there was no evidence that AB-PT had ever bid too high for any picture, (F. 70, Pet. p. 23a), and that it had not bought more pictures than the Paramount Theatre actually needed to operate, (F. 100, Pet. p. 30a). It found that Petitioner had discontinued bidding *because* of an arrangement with AB-PT, (F. 74, Pet. p. 24a), and there were no findings that Petitioner's alleged losses were due to any inability on its part to bid competitively against AB-PT. On the contrary, the findings were that Petitioner's troubles came from economic factors, poor judgment and new competition from other theatres in the area, (F. 81-86, Pet. p. 25a-27a). Findings 33-38, 41-43, 47-48, 92-94, 98 and 101-2 all support the ultimate finding that there was no conspiracy in operation during the damage period, and that any conspiracy had ended *before* the time when competitive bidding was first sought by the Petitioner and was instituted by the distributors at Petitioner's request.

The decision, therefore, stands for no proposition such as that for which Petitioner contends. It is clear, however, that in the face of the record, the inauguration of competitive bidding in October, 1950, and its conduct until Petitioner abandoned it, and the actions of the parties after

September 15, 1950, was inconsistent with the co-existence of any conspiracy. It would be impossible to have pictures licensed by distributors under a system which was "truly competitive", (F. 67, Pet. p. 22a), who were at the same time engaged in a conspiracy to withhold pictures from the Petitioner. That is the true meaning of the findings of the Trial Court which the Court of Appeals has held were not "clearly erroneous".

Petitioner's Third Point

Petitioner concedes that a demand by an exhibitor for pictures from a distributor is undoubtedly required in the usual situation where an exhibitor seeks damages for failure to obtain pictures which he desires, (Pet. p. 20). It contends, however, that in this instance "more formal" demands were excused because they would have been futile since it allegedly had been told by the Respondent-distributors that it could have only those pictures "sanctioned by the competitor, AB-PT". (Pet. p. 21). This evidence, even if true, was confined to the period of April or May, 1950, (F. 38, Pet. p. 18a), which, of course, was during a period for which no damages were alleged or sought to be recovered, (F. 27, Pet. p. 16a; F. 47-9, Pet. p. 20a; F. 80, Pet. p. 25a; F. 92-4, Pet. p. 29a; F. 99-102, Pet. p. 30a).

Petitioner makes no specific attack on any one of these findings, and it cannot be said that any one of them is clearly erroneous. Indeed, as the Court of Appeals said of Petitioner's contentions, "The record contains no adequite evidentiary basis for these contentions, though the record does indicate that the Paramount Theatre had larger daily gross earnings than appellant's Peekskill, and hence that a top-grade picture, (normally rented on a basis which includes a percentage of gross earnings), would produce more for the distributor if placed in the Paramount

rather than in the Peekskill. Certainly, if a distributor is to be forced to give up a monetary advantage of that sort he must be confronted with a fair demand—presumably accompanied by an offer of competitive bidding," (Pet. p. 9a).

These statements of the Court of Appeals were based on the whole record, including findings such as findings 89-91, (Pet. p. 28a), and 97, (Pet. p. 29a). Those findings indicated that the Peekskill Theatre's grossing ability was considerably less than that of the Paramount Theatre, and showed that actual figures resulted in a larger return of film rental to a distributor from the exhibition of its pictures in the Paramount Theatre than in the exhibition of comparable pictures in the Peekskill Theatre. These facts support Finding 98, (Pet. p. 29a-30a), to the effect that in licensing pictures for exhibition in the theatres in Peekskill during the period for which Petitioner was claiming damage, there was no evidence that each of the distributor-Respondents did not act independently and in accordance with its own best judgment.

The conclusion of the Court of Appeals that this was not a case where a demand was excused is amply supported by the authorities which it cited. *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840, 845 (C. A. 2, 1954); *Webster Rosewood Corp.* v. *Schine Chain Theatres*, 263 F. 2d 533, 536 (C. A. 2, 1959), cert. den. 360 U. S. 912, (1959); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568, (C. A. 7, 1951), cert. den. 342 U S. 909 (1952), and by *Lawler* v *National Screen Service Corp.* F. 2 ; (C. A. 3, 1959), not yet officially reported, but appearing in 1959 CCH Trade Cases ¶ 69,446. In the case at bar there was no evidence as to the identity of any picture which the Paramount Theatre exhibited which Petitioner claimed that it should have been permitted to exhibit, (F. 94, Pet. p. 29a), and there was no evidence

that Petitioner, after the commencement of the damage period, to wit, September 30, 1950, had ever made any demand upon any distributor-Respondent which was refused, (F. 57, Pet. p. 21a).

The Petitioner, without any specification, in effect asks this Court to reject nearly all of the findings of the Trial Court and substitute contrary findings. This the Court will not do. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949); *United States* v. *Real Estate Boards*, 339 U. S. 485, 495-6 (1949).

This Court has said it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1948). For a Trial Court to reject the view of one litigant and accept the view of another and choose between two permissible views of the weight of evidence is not "clearly erroneous", (*United States* v. *Yellow Cab Co.*, *supra*, p. 342).

Conclusion

The Petition should be denied.

Respectfully submitted,

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